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No. 981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES O. McCUE, JR. and
JAMES O. McCUE, SR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

SIMON H. RIFKIND
Attorney for Petitioners
575 Madison Avenue
New York 22, New York

SAMUEL J. SILVERMAN
JOHN G. SIMON
ALLAN BLUMSTEIN
New York, N. Y.

GEORGE F. LOWMAN
Stamford, Conn.
Of Counsel

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1. Petitioners argued that the Government's repudiation of the 1957 agreement not to prosecute them for alleged false statements violated fair standards of criminal justice. In answer, the Government contends "that the record does not support the existence of an agreement not to press the instant charges" (Gov. Br. 10).

However, both the Court of Appeals (Pet. 14a) and the District Court (P. A. 119a)* assumed that there was such an agreement. Indeed, in the Court of Appeals, the Government itself did *not* deny that the agreement was made nor did it challenge petitioners' recital of its terms.

Moreover, the record fully supports petitioners' claim. Both the United States Attorney and Mr. Steadman, one of defendants' counsel, have testified that they intended the

*"P. A." refers to Petitioners' (Appellants') Appendix and "G. A." refers to Government's (Appellee's) Appendix, both in the Court of Appeals.

1957 agreement to dispose of all criminal matters then known to the Government arising out of the Special Agent's investigation and referred to in the investigative file then in the possession of the United States Attorney; these matters included the alleged false statements.* (P. A. 12a, 99a-100a; see also P. A. 23a-25a). Mr. Steadman also testified that both the United States Attorney and defense counsel acknowledged this intention to each other at a conference on April 15, 1957 in the following exchanges:

(a) Mr. Steadman brought the alleged false statements to the United States Attorney's attention and said, referring to the alleged false statements, "I want to emphasize that we—it is our intention and we want it understood here, that we are attempting and want to wind up all of the issues arising out of this income tax investigation, including this particular problem." The United States Attorney responded by saying, "Well, I understand that that's the objective" (P. A. 41a).

(b) Near the end of the conference Mr. Lowman said to the United States Attorney, "But as to these matters that are covered in this investigation here, that were covered in your files, is it understood that this [agreement] will wind up and conclude the whole thing?" The United States Attorney responded by saying either, "That's what the reason is for our undertaking here," or "That's the reason for being here" (P. A. 42a).

Solely on this point of the explicitness with which the agreement was stated is there a degree of inconsistency in

*The Special Agent's report contained in the investigative file discussed certain statements made by the McCues (the statements involved in the case at bar—and alleged that these statements were false (P. A. 33a, 38a, 104a, 179a, 451a), although no recommendation for prosecution was made at that time.

the testimony of the United States Attorney. The United States Attorney testified that he had no recollection of acknowledging his intention to defense counsel, although he testified that he might have done so (P. A. 98a), that he would not deny doing so (P. A. 111a), and that he *did* tell defense counsel that he "didn't intend to bring any other charges against the McCue's . . ." (P. A. 99a).

In any event, as the United States Attorney testified, the conversations left no doubt in anyone's mind as to the scope of the agreement reached. In response to a question by defense counsel as to whether this disposition "wound up" everything that was then before the United States Attorney, i.e., "the present indictment" and "everything that was contained in that file," the United States Attorney testified:

> "I think there was no question about that in your own mind, and there was certainly no question about it in mine." (P. A. 99a).

And the United States Attorney further testified:

> "Q. The agreement was—and you say it—that this would terminate the pending criminal proceedings against the McCue's, then covered by the information in the investigative file in the office of the United States Attorney? A. That is true.
>
> Q. In that investigative file, were specific references to false statements made in 1954, were there not? A. Yes, there were." (P. A. 101a).
>
> * * *
>
> Q. When you did say it was agreed, what you meant was that there would be no further prosecution; isn't that so? A. That's right.
>
> By the Court:
>
> Q. No further prosecution of what? No further prosecution of the indictment? A. Violation of the internal revenue laws relating to evasion of taxes.

By Mr. Lowman:

Q. And with respect to the information contained in the investigative file? A. Right.

Q. The investigative file contains the false statements, does it? A. I don't know what—it's contained a lot of things, Mr. Lowman.

Q. It did contain the false—— A. Yes, it did contain the false statements." (P. A. 113a; see also P. A. 23a-25a).

The Government seeks to minimize the importance of the question presented to this Court by stating that it merely involves enforcement of "agreements between counsel for the parties to a lawsuit" (Gov. Br. 14) and by stating that compliance with "an informal agreement between counsel" for the "parties" (Gov. Br. 15), is a matter of "professional and personal conscience" for "each party" (Ibid.). The point this bland language overlooks—the point requiring determination by this Court—is the question of whether the Government of the United States is just another "party," whether the Government should not be held to a higher standard of fair dealing than the most unscrupulous civil litigant; whether, in short, a repudiation by the United States Government can justly be dismissed as a matter of no more than "professional and personal conscience."

2. The Government seeks to defend the multiple prosecutions of the petitioners on the ground that the 1957 dispositions of the tax evasion indictments resulted in a violation of the Justice Department's otherwise invariable policy to press for a felony conviction in tax cases (Gov. Br. 17). Accordingly, says the Government, a failure to prosecute these defendants might well have been viewed as a gross discrimination in favor of the "wealthy and influential" (Gov. Br. 17).* In so defending these prosecutions, the

*The Government also urges that "the fraud attempted to be perpetrated upon the government by petitioners' false oral statements plainly called for vigorous prosecution" (Gov. Br. 16-17). But

Government clearly acknowledges that they were not brought for the principal purpose of protecting the Internal Revenue Service against false statements. Instead, the Government is using § 1001 to give the Government a second chance to subject these defendants to felony treatment for their alleged violations of the Internal Revenue laws. The Government thus proclaims that it is not using § 1001 to protect Government departments from perversion of their proper functioning by means of false statements.

In *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955), the court condemned a similar attempt to use § 1001 to impose punishment for other substantive offense for which the defendants there had previously been indicted. The court wrote:

> "It seems quite inconsistent with our fundamental concepts of due process in the administration of criminal justice to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein, as a different separate substantive criminal offense under section 1001. The clear purpose of the section was to operate as a shield for defense rather than as a sword for attack." *Id.* at 207.

The possibility of misuse of § 1001 to enable the Government to bring a second round of prosecutions when it is "disappointed" with the first round (Gov. A. 38), emphasizes the evils inherent in applying § 1001 to answers to criminal investigators.

3. The Government cites several cases to attack "petitioners' broad argument . . . that the statute was not in

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the Government knew about this "fraud" at the time of the 1957 tax evasion indictments and did not prosecute (P. A. 33a, 38a, 86a, 104a). The Government became concerned with this "fraud" only after the "disappointing" disposition of the 1957 indictments.

tended to apply to any false statements made to criminal investigators." (Gov. Br. 18). In fact, our contention (not quite so "broad") is that the statute does not apply to exculpatory answers given by suspects in response to questions posed by criminal interrogators investigating the suspect's guilt. This issue was presented in none of the Government's cases.

In *United States* v. *Silver*, 235 F. 2d 375 (2d Cir.), *cert. denied*, 352 U. S. 880 (1956), where the issue here raised as to the scope and effect of § 1001 was not presented, the Court upheld the conviction of an employee of the Internal Revenue Service who falsely answered questions posed to him by an Inspector of the Internal Revenue Inspection Service engaged in investigating alleged bribery of the employee. (The Court's opinion inadvertently states that the interrogator was a Special Agent but the Government's brief clarifies his status). The Inspector operated under the Assistant Commissioner (Inspections), who was responsible for

> "The assurance of scrupulous adherence to proper ethics and standards of conduct by all personnel, and avoiding and detecting irregularities, defalcations, etc., appraising management and operations to promote economy and efficiency and foster continuing attention to improvements; conducting personnel investigations and such investigations as the Commissioner may direct."

Exhibit D to Commissioner's Reorg. Order No. Hdq—1, July 29, 1952, reprinted in 4 P-H 1952 Fed. Tax Serv. ¶ 76,326 at p. 76,289.

Accordingly, the interrogator was not a criminal investigator and was not gathering evidence for purposes of criminal prosecution.* Instead the interrogation concerned

*Indeed, the statute of limitations had run on the possible bribery offense at the time of interrogation.

the internal administrative functioning of the Internal Revenue Service—including the integrity of Internal Revenue practices, and the question of whether tax returns of possible bribe givers should be reopened; a false answer may well have perverted this functioning.

The case of *Brandow* v. *United States*, 268 F. 2d 559 (9th Cir. 1959), involved a similar problem, for the defendant there gave an affidavit to a Special Agent investigating activities of *a Revenue Agent*; in his affidavit the defendant falsely denied having told a taxpayer that the Revenue Agent disclosed to the defendant the Government's case against the taxpayer.

Cohen v. *United States*, 201 F. 2d 380 (9th Cir.), *cert. denied*, 345 U. S. 951 (1953) is a case where the legal issue raised under this heading was not presented to, or considered by, the Court, and where the defendant's statement consisted of a written net worth schedule, a type of affirmative representation whose "perverting potential" distinguishes it from an oral exculpatory denial for reasons clearly set forth in *United States* v. *Philippe*, 173 F. Supp. 582, 584-85 (S. D. N. Y. 1959).

In *Cooper* v. *United States*, 282 F. 2d 527 (9th Cir. 1960) again the legal issue raised here was not considered, as emphasized by the fact that it is difficult to tell from the opinion whether the false statement was made to two Special Agents (as stated in the indictment), or to one Special Agent and one Revenue Agent (as stated in the transcript of interrogation), or to two Revenue Agents (as stated in the Court's opinion). As was pointed out in the Petition herein, "Revenue Agents" are not criminal investigators. Their sole function is to determine how much tax is owed the Government. Special Agents, on the other hand, are criminal investigators (Pet. 15).*

*The Government seeks to avoid the foregoing distinction, and the clear issue of statutory interpretation it presents, by noting that

The only cases which do consider the precise issue raised here (the cases referred to summarily in a Government footnote, Gov. Br. 19 n. 10) hold that 18 U. S. C. § 1001 does not apply to exculpatory answers given by suspects undergoing criminal interrogation with respect to their guilt. *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955); *United States* v. *Dawey*, 155 F. Supp. 175 (S. D. N. Y. 1957); *United States* v. *Philippe*, 173 F. Supp. 582 (S. D. N. Y. 1959). In the face of this line of authority, the Government's continued use of 18 U. S. C. § 1001 to gain convictions of such suspects presents a situation calling for resolution by this Court.

4. The cases the Government relies on do not support the conclusion that § 1001 applies to oral utterances.

In *United States* v. *Beacon Brass Co.*, 344 U. S. 43 (1952), the Court decided that oral misrepresentations constituting a willful effort to evade taxes could be prosecuted under § 145(b), Internal Revenue Code of 1939. In disposing of petitioner's claim that the prosecution was barred because such oral misrepresentations were exclusively covered by 18 U. S. C. § 1001 (there designated as Section 35(A), Criminal Code), the Court assumed *arguendo* that § 1001 covered oral utterances and went on to conclude that this was no bar. Since both the petitioner and the Government stated that § 1001 applied to oral utterances, this question was not litigated before the Court, and the

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an Internal Revenue Agent sat in on the conference in the case at bar. (Gov. Br. 18, n. 9). But the defendants were indicted for false answers while being "interrogated by Special Agents of the Internal Revenue Service" (P. A. 6a, 418a) and thus were convicted not of false answers to the Internal Revenue Agent but of false answers to the Special Agents. Nor does the record support the Government's speculation that the defendants here sought to avoid civil liability as well as criminal sanctions (Gov. Br. 18). Indeed, whether or not the Government's surmise is accurate, the perversion of a governmental function is measured by what that function was intended to be—in this instance the function of criminal investigation—not by the defendants' aspirations.

arguendo nature of the Court's dictum is pointed up by the way the Government briefed this question: "The Fact that Appellee's Conduct *May Have* Violated Section 35(A) of the Criminal Code [now 18 U. S. C. § 1001] Is No Bar. . . ." Government's Brief, *United States* v. *Beacon Brass Co.*, *supra*, p. 15 (emphasis supplied).

In *Marzani* v. *United States*, 335 U. S. 895 (1948), the Supreme Court affirmed by an equally divided court a decision of the Court of Appeals for the District of Columbia, 168 F. 2d 133 (D. C. Cir. 1948), which ruled against the defendant on the following issue presented in a Petition for Rehearing:

> "The issue is whether the statute can be consistently applied to a prosecution for statements not required to be made, not under oath, not stenographically transcribed, never reduced to writing, made at a private conference initiated wholly at appellant's request, which he was not required to attend, solely to ask the reasons of his superior in the government for a request which had been made for appellant's resignation, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false and fraudulent statement, and where the statute provides criminal penalties for false and fraudulent statements made 'in any manner within the jurisdiction of any department or agency of the United States.'": 168 F. 2d at 141.

The above question was specifically directed at the issue of "due process and a fair trial." Record on Appeal, *Marzani* v. *United States*, *supra*, p. 282. Although the Circuit Court's decision rejecting this contention included a sentence stating that § 1001 is not limited to written statements, 168 F. 2d at 142, the question of whether the statute covered

oral statements was not argued or briefed either to the Circuit Court or to the Supreme Court.

Knowles v. *United States*, 224 F. 2d 168 (10th Cir. 1955) did not involve oral statements, as the Government contends, but rather written net worth statements, and the Court decided this case on the basis of the fact that written net worth statements were involved. The Record on Appeal indicates that in a collateral attempt to discredit broad statements made by the Government concerning the scope of § 1001, the defendant argued that the statute did not apply to oral statements. It was this argument, having nothing to do with defendant Knowles' own case, to which the Court referred in its description of defendant's various assertions.

In *United States* v. *Zavala*, 139 F. 2d 830 (2d Cir. 1944) and *United States* v. *Meyer*, 140 F. 2d 652 (2d Cir. 1944), there are one-sentence statements to the effect that former 18 U. S. C. § 80 (which embodied § 35, Criminal Code), the predecessor of 18 U. S. C. § 1001, applied to oral statements. In the former case the Court wrote that there was, in any event, "a written document furnished both in its original and amended form by the defendant, and in either form . . . false," 139 F. 2d at 831, and the Court's statement concerning oral statements was therefore dictum. The latter case cites the former as authority. 140 F. 2d at 655.

Respectfully submitted.

SIMON H. RIFKIND
Attorney for Petitioners
575 Madison Avenue
New York 22, New York

SAMUEL J. SILVERMAN
JOHN G. SIMON
ALLAN BLUMSTEIN
New York, N. Y.

GEORGE F. LOWMAN
Of Counsel

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